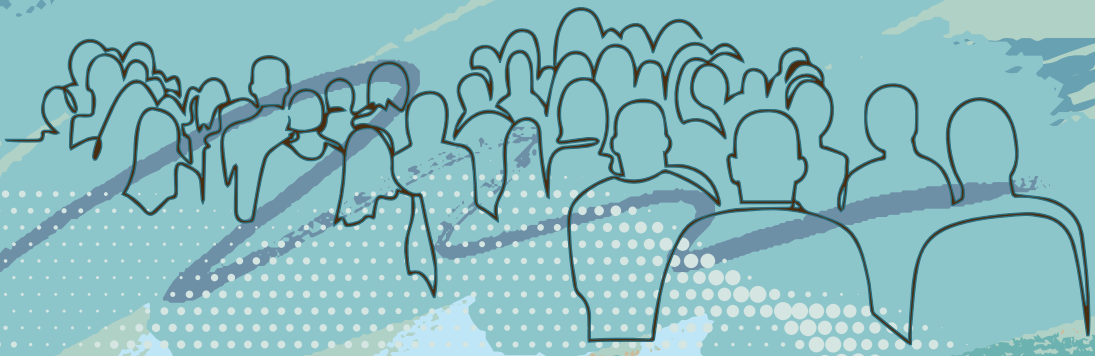
GEORGIAN YOUNG LAWYERS' ASSOCIATION

JUSTICE PROVIDED UNDER THE 1984 CODE

QUARTERLY REVIEW
(JULY - SEPTEMBER 2022)



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(July - September 2022)

Tbilisi

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INTRODUCTION

Georgia still uses the Code of Administrative Offences, adopted in 1984, which creates problems in terms of protecting human rights. The Action Plan for 2022 approved by the Legal Affairs Committee of the Parliament of Georgia intends to reform the Code, as one of the priority issues. According to the plan, by the end of 2022, a draft bill should be prepared, which will make it possible to systematically regulate the current provisions of the law and develop unambiguous rules governing the relevant legal relations. In addition, all this must be carried out in full compliance with international standards for the protection of human rights.[1]

The Georgian Young Lawyers' Association (GYLA) hereby presents a quarterly review conducted from July 1st to September 30th, 2022 to discuss the main developments in the legislation and practice of administrative offences.

Statistical information

According to data provided by the Ministry of Internal Affairs (MIA),[2] during the period of July-September 2022, the following incidences were revealed:

Petty hooliganism (Article 166)	**910**
Non-compliance with a lawful order of the police (Article 173)	**1039**

[1] Action plan of the Legal Affairs Committee of the Parliament of Georgia, 2022. Available at: https://bit.ly/3cIqKnG, verified: 31.07.2022.

[2] Statistical information published by the Ministry of Internal Affairs, Available at: https://info.police.ge/page?id=659&parent_id=633, last accessed: 03.11.2022.

During the period of July-September 2022, 465 individuals were subjected to administrative detention, among which five-day (218 persons) and ten-day arrests (136 persons) were the most frequent durations of detention.[3]

MONITORING OF COURT PROCEEDINGS

In September 2022, the GYLA, in cooperation with "Netgazeti", monitored court proceedings of administrative violation cases. During the monitoring, a journalist attended randomly selected court hearings on ordinary cases of administrative violations in the Tbilisi City Court and then presented the results of the observations to the public.

As a result of monitoring, the "Netgazeti" journalist attended 20 court hearings of administrative offences heard by three different judges. The monitoring showed that in ordinary cases persons accused of committing administrative offences, as a rule, are not represented by a lawyer; cases of this type are characterized by the lack of evidence and consist of only a few protocols drawn up by police officers (the police do not proactively provide video recordings); the consideration of cases is completed within a short time, with most cases being decided within 10-12 minutes. In addition, the court tends to attach special importance to the confession of a person, and if this is the case, the court does not examine additional evidence at all, nor does it require the police to submit any video recording.

To illustrate, here are a few examples from the monitoring results.

[3] Statistical information published by the Ministry of Internal Affairs, Available: https://info.police.ge/page?id=632&parent_id=233, last accessed: 03.11.2022.

1 **“According to the factual circumstances, police officers stopped a moving vehicle in order to inspect the car. The driver was tested on a breathalyzer and fined.**

"While we were preparing a protocol of fine, he was swearing loudly and indiscriminately, which is why the policemen urged him to stop. Seeing that he was fined, he then continued to insult the police officers," said Soso Danelia.

Judge Tamar Mchedlishvili finalized the case within the shortest possible time, 8 minutes.

"Shall we deem all evidence to have been examined?" - She asked the person accused of the administrative violation and the police officer, and received a positive answer from both parties.

The police officer, when expressing his point of view, declared that the person confessed to the offence and regretted committing it. The police officer asked the judge to apply the minimum punishment. The judge granted his motion, pronounced G.TS guilty, and imposed a fine in the amount of 2,000 GEL”.[4]

[4] An article from "Netgazeti": "How the Court and the Police Use the Code of Administrative Offences Adopted during the Soviet Union", available at: https://bit.ly/3hQhBfn, last accessed: 19.11.2022.

2 **"According to the case materials, G.G., the person accused of an administrative offence, was violating public order, shouting, and swearing in the street. He showed aggression towards the police, prevented them from performing their professional duties, and verbally insulted them. Accordingly, an offence protocol was drawn up against him under Article 166(1) and Article 173(2) because he already had a criminal record for disobedience to the police.**

Judge: Do you understand your rights? Do you know that you have the right to have a lawyer?

G.G. – Yes, I do.

Judge: Would you like to exercise any of your rights?

G.G. - Well, I guess not.

While describing the circumstances of the case, a representative of the administrative body declared:

"The accused had physical injuries. The ambulance tried to take him to the hospital, but he refused and started swearing. When the police arrived at the spot, he swore at them too".

The aforementioned court hearing lasted 10 minutes. On the basis of the defendant's confession, the judge considered the evidence under Article 166 examined, yet the judge could not reach a decision regarding the resistance to the police officers, since the case materials were not submitted in a due manner.

In particular, the police officer did not know when exactly the accused had been fined on the basis of Article 173, whether the court decision had entered into force, or whether the fine had been paid.

Therefore, the hearing was adjourned".[5]

REVIEW OF CASES

During the reporting period, several interesting cases were heard in other courts, two of which are considered below:

Arresting and fining a person for a Facebook post

On 30 September 2022, the Batumi City Court ruled in the case of Khvicha Shakarishvili. According to the court's decision, Khvicha Shakarishvili was recognized as an offender and was fined 2500 GEL.

In the given case, several circumstances are noteworthy:

- The grounds for drawing up an offence protocol against Khvicha Shakarishvili were a post published on his personal Facebook page. On July 6, he published a post criticizing the actions of police officers.[6] The reasoned decision of the court is not available for the time being. Therefore, we will present an analysis of the content of the court's decision in the next quarterly review.

[5] Ibid.

[6] The article dated 17 July 2022 by "Batumelebi": "A citizen arrested in Batumi for a Facebook post - this can happen only in North Korea", available at: https://batumelebi.netgazeti.ge/news/423519/, last accessed: 03.11.2022.

- In the given case it is significant that the police arrested and drew up an offence protocol against Khvicha Shakarishvili eight days after the controversial Facebook post was published. The period of his detention was further extended by hours. In the protocol of Khvicha Shakarishvili's detention, it is noted that the arrest was carried out "to prevent a violation of the law". It should be noted that administrative detention is a temporary measure that can be used in cases clearly stipulated in the law. "Prevention of a violation" can serve as one of the grounds for an arrest. Administrative detention may be justified when it is used immediately upon observing a crime being committed and when it is necessary to temporarily isolate the detainee to administer justice, which was not the case on this particular occasion given the timeline of events. Therefore, it is clear that Khvicha Shakarishvili was arrested unlawfully, eight days after the disputed fact. This indicates that the mechanism of detention was used by the police not to prevent crime, but rather to punish the person.

The GYLA represents Khvicha Shakarashvili's interests and once the court judgment is delivered, it will be challenged in the Court of Appeals.

The decision of the European Court of Human Rights on the case "Makarashvili and others v. Georgia"

On 1 September 2022, the European Court of Human Rights announced its decision on the case "Makarashvili and others v. Georgia". The case concerned the administrative arrest of three individuals (Giorgi Makarashvili, Irakli Kacharava, and Zurab Berdzenishvili) during the protest demonstrations on 18 November 2019[7] under Article 166 (petty hooliganism) and Article 173 (resistance to a lawful order of a law enforcement officer) of the Administrative Offences Code and their detention for 4-12 days.

[7] The purpose of the demonstration was to protest against the Parliament's failure to implement the election reform, during which the demonstrators blocked all entrances to the Parliament.

The applicants argued that, when reviewing their cases, the domestic courts (1) overemphasized the importance of the statements provided by the police officers; (2) unfairly distributed the burden of proof on the applicants; and (3) the absence of a prosecutor in the administrative-offence proceedings against them had invested the trial judge with the functions of a prosecuting authority, in breach of the judicial impartiality requirement; (4) In addition, the applicants alleged that they did not have enough time to prepare their defence position; (5) they were not afforded an equal opportunity to invite witnesses to the hearing as compared to the prosecution, and finally, (6) the applicants argued that their arrest and punishment violated their right to peaceful assembly. The Court declared the applicants' complaints regarding the lack of adequate time and means to exercise the right to a fair remedy, as well as the possibility of summoning witnesses, inadmissible since the Court deemed that the above-mentioned circumstances did not give rise to any violation of the rights and freedoms provided for in the Convention or its protocols. In the remaining part, the Court considered the appeal admissible.

The Court found a violation of Article 6 § 1 (right to a fair trial) and Article 11 (freedom of assembly and association) of the Convention with respect to the second applicant, Irakli Katcharava, and awarded him compensation for moral damages in the amount of 1,600 Euros, while found no violation of the kind in relation to the first and third applicants.

The Court’s decision, which found no violation in relation to the two persons, sparked much controversy. Among them, a Facebook page sponsored by the "Georgian Dream" disseminated false information that in the given case, the European Court of Human Rights found that "the application of the law governing detention, procedural rights of the detainee, imprisonment as a punishment provided for in the Code of Administrative Offences of Georgia in practice was in line with Article 6 of the European Convention on Human Rights (the right to a fair trial)."[8] The spread of false information triggers wrong perceptions and may hinder the process of criminal law reform.

[8] A post published on 11 October 2022 on the Facebook page "Actually", available at: https://bit.ly/3tJAbIM, last accessed: 19.11.2022.

On the contrary, the judgment points out that the Court did not intend to review the compatibility of national legislation with the Convention in general, and that the Court must limit itself to directly considering the problematic issues specifically raised by the applicants, thereby not overlooking the general context.

The Court held that the absence of a prosecutor during an administrative case proceeding does not contradict the impartiality required under Article 6. At the same time, the Court concluded that, given the circumstances of the case, there is a close connection between, on the one hand, the absence of the prosecutor in the administrative case proceeding, and, on the other hand, the approach of national courts to the distribution of the burden of proof, including the adoption of certain presumptions regarding the evidence presented by police officers (when acting as prosecutors).

With respect to the first and third applicants, the Court found no violation, not because the Court generally considered the applicable legislation to be in conformity with the standards of the right to a fair trial, but because, unlike the second applicant, they did not exercise their right to express their opinion concerning the facts presented by the police. Furthermore, in relation to the first and third applicants, the Court noted that, in addition to the statements of the police officers, there was other evidence (footage) as well. However, it was emphasized that as the Court was not provided with copies of the case files available at the national level, it could not assess the Court's approach to evidence.

In contrast, with respect to the second applicant, the police officer’s statement was not backed by any other evidence. As a result, the Court held that the applicant was placed in a position where he had to prove his innocence himself. Moreover, as regards the second applicant, the available domestic material did not demonstrate that he was among the organisers of the demonstration or personally blocked either the Parliament building’s entrances or the police attempts aimed at clearing them. Rather, he was arrested some two hours after the police had started to reopen the entrances to the Parliament building. It remained unclear at the domestic level and during the proceedings before the Court whether, by then, the police had managed to succeed, at least partly, in reopening those entrances. If they indeed had succeeded, then that would affect the

assessment of the necessity and the proportionality of the second applicant's arrest and his subsequent conviction. He was arrested two hours after the police had started to reopen the entrances to the Parliament building (even partially) and no assessment was made by the domestic courts of whether that blocking of the road had been intentional or a result of circumstances on the ground, Due to these violations, the Court found a violation of both the right to a fair trial and the freedom of assembly in relation to the second applicant.[9]

[9] For a comprehensive review of the case, please see the GYLA's website, available at: https://bit.ly/3EkWBFa, last accessed: 19.11.2022.